

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2802-CR
STATE OF WISCONSIN**

Cir. Ct. No. 1993CF460

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY L. KLOTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: WILLIAM DOMINA, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Gary L. Klotz appeals from a judgment of conviction and an order denying his motion for sentence credit. He contends that the rule announced in *State v. Magnuson*, 2000 WI 19, 233 Wis.2d 40, 606

N.W.2d 536, for determining sentence credit violates his right to equal protection. We reject Klotz’s argument and affirm the judgment and order.

¶2 In 1994, Klotz was convicted of four counts of first-degree sexual assault of a child. On three counts, Klotz received concurrent prison sentences. On the fourth count, he received fifteen years of consecutive probation. While incarcerated on the charges, Klotz was also convicted of solicitation to commit arson. For that offense, he received a consecutive prison sentence.

¶3 In 2005, Klotz was paroled and placed on electronic monitoring by the department of corrections. While on electronic monitoring, the department did not allow Klotz to leave his home without permission. On multiple occasions, the department detained Klotz for being out of range of the electronic monitoring system.

¶4 In 2010, the department revoked Klotz’s probation.¹ He returned to court for sentencing and requested sentence credit for the entire period that he had been subject to electronic monitoring. The circuit court rejected his request and sentenced him to eight years in prison, awarding credit only for various holds and the time between revocation and sentencing.

¶5 Klotz subsequently filed a postconviction motion, arguing that the *Magnuson* rule for determining sentence credit—that a status subjecting one to an escape charge is necessary to constitute “custody” for which credit is due—

¹ Klotz’s parole was also revoked; however, that revocation did not involve a sentencing by the circuit court and is not the subject of this appeal.

violates his right to equal protection. The circuit court summarily denied the motion. This appeal follows.

¶6 The rule for determining sentence credit was established by the Wisconsin Supreme Court in *Magnuson*. There, the court was required to construe the sentence credit statute, which provides that “[a] convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed.” *Magnuson*, 233 Wis. 2d 40, ¶12 (quoting WIS. STAT. § 973.155(1)(a)). The term “custody” is not defined in the statute. Accordingly, consistent with existing precedent, the court looked to the definition of “custody” found in the escape statute. *Magnuson*, 233 Wis. 2d 40, ¶¶13-15 (citing WIS. STAT. § 946.42(1)(a)).² Ultimately, the court held that “an offender’s status constitutes custody whenever the offender is subject to an escape charge for leaving that status.” *Id.*, ¶25.

¶7 On appeal, Klotz acknowledges that he is not entitled to sentence credit under the *Magnuson* rule because he was not subject to an escape charge during the time period for which he seeks credit. However, Klotz contends that the *Magnuson* rule violates his right to equal protection by arbitrarily and

² In *State v. Gilbert*, 115 Wis. 2d 371, 378-79, 340 N.W.2d 511 (1983), the Wisconsin Supreme Court first encountered the issue of determining what constituted custody for sentence credit purposes and defined custody by reference to the escape statute. Thereafter, in cases leading up to *State v. Magnuson*, 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536, Wisconsin courts consistently referred to the escape statute for guidance. See, e.g., *State v. Cobb*, 135 Wis. 2d 181, 184-85, 400 N.W.2d 9 (Ct. App. 1986); *State v. Pettis*, 149 Wis. 2d 207, 209-11, 441 N.W.2d 247 (Ct. App. 1989); *State v. Sevelin*, 204 Wis. 2d 127, 135, 554 N.W.2d 521 (Ct. App. 1996).

irrationally granting sentence credit to some home detainees and denying it to others similarly situated.³

¶8 Equal protection requires the State to have reasonable and practical grounds for the classifications it draws. *State v. Quintana*, 2008 WI 33, ¶79, 308 Wis. 2d 615, 748 N.W.2d 447. Challenges to differences in the treatment of criminal offenders are subject to rational basis review. *Hilber v. State*, 89 Wis. 2d 49, 54, 277 N.W.2d 839 (1979). Under that standard, equal protection is violated only if the classification rests upon grounds that are wholly irrelevant to the achievement of the State’s objectives. *Konkel v. Acuity*, 2009 WI App 132, ¶27, 321 Wis. 2d 306, 775 N.W.2d 258.

¶9 Here, we are satisfied that the *Magnuson* rule does not violate Klotz’s right to equal protection. Although it is true that the rule treats some home detainees differently than others for purposes of determining sentence credit, there is a rational basis for doing so. Indeed, that basis is provided by *Magnuson* itself, which explains that by construing the term “custody” to mean a status where an offender is subject to an escape charge, the court created a bright-line rule that would help relieve an unnecessary burden upon sentencing courts as well as promote consistency in establishing sentence credit. *See Magnuson*, 233 Wis. 2d 40, ¶¶22, 25, 47. Based upon the existing precedent, we cannot say that the *Magnuson* court’s decision to condition sentence credit to the escape charge was

³ For example, Klotz notes that a person awaiting trial who is placed on home detention with electronic monitoring is subject to an escape charge and therefore entitled to sentence credit under the rule. The same is true for a person who is released to extended supervision and placed in home monitoring under the intensive sanctions program.

wholly irrelevant to the achievement of these objectives. Accordingly, we must reject Klotz's claim.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

